Supreme Court, U.S.
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In The

# Supreme Court of the United States

CRAIG ALLEN IRWIN,

*Petitioner,*

vs.

NORTH DAKOTA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does North Dakota Century Code § 39-08-01(2), which provides for an enhanced sentence for a prior offense, violate the prohibition against any bill of attainder under Article I, § 10 of the United States Constitution when there has been no judicial determination of guilt for that prior offense at the time of the commission of the instant offense?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Craig Allen Irwin respectfully petitions for a writ of certiorari to the Supreme Court of North Dakota in *State v. Irwin*, No. 20100082.

## OPINION BELOW

The opinion of the North Dakota Supreme Court (App. 1-7) is reported at 2010 ND 132, 785 N.W.2d 245. The relevant trial court proceedings and order (App. 8-32) are unpublished.

## JURISDICTION

The North Dakota Supreme Court decision was issued on July 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article I, § 10 of the United States Constitution provides in relevant part: "No state shall . . . pass any bill of attainder . . . "

North Dakota Century Code § 39-08-01 provides in relevant part:

> (2) A person violating this section or equivalent ordinance is guilty of a class B misdemeanor for the first or second offense in a five-year period, of a class A misdemeanor for a third offense in a five-year period, of a class A misdemeanor for the fourth offense in a seven-year period, and of a class C felony for a fifth or subsequent offense in a seven-year period. The minimum penalty for violating this section is as provided in subsection 4. The court shall take judicial notice of the fact that an offense would be a subsequent offense if indicated by the records of the director or may make a subsequent offense finding based on other evidence.

## STATEMENT OF THE CASE

On January 23, 2008, Petitioner Craig Allen Irwin, with legal counsel, pleaded guilty to a felony charge of Driving Under the Influence (DUI). App. 15-16. The factual basis for the felony, alleged to be a fifth DUI in seven years, was as follows:

> "The prior convictions would be there is a conviction from June 13th of 2003 out of Burleigh County District Court from a January 3rd of 2003 offense date. Secondly, there is a June 13th of 2003 conviction for driving under the influence out of Burleigh County District Court from a February 5th of 2003 offense date.

> The third conviction would be a May 13th of 2002 DUI conviction out of Morton County District Court arising from a March 19, 2002 offense date. And then there is the case that was pending when Mr. Irwin was arrested on this one on June 30th of 2007, and that would have been criminal number 08-07-K-1217, that was a fourth in seven DUI in Burleigh County."

App. 16. June 13, 2007 was the offense date on the case which was pending. App. 16-17. Irwin was convicted of that offense on December 7, 2007. App. 17-18.

Irwin's legal counsel did not object to the factual basis. App. 17-18. In regard to the pending charge of DUI, legal counsel stated:

> "[T]he Supreme Court [of North Dakota] had a decision on the very point, and then said if it's number of offenses, you really don't have to have prior convictions at the time of the offense. A lot of states say otherwise, so that was against us and one of the factors in the change of plea."

App. 18. Irwin was sentenced to the maximum incarceration of five years. App. 19.

On February 12, 2010, Irwin, with the undersigned counsel of record, moved the sentencing court to withdraw his plea of guilty to the felony DUI. App. 20-29. Irwin contended there did not exist a factual basis to support a fifth offense DUI on June 30, 2007. App. 22. More specifically, Irwin contended that using

the pending charge of DUI on June 30, 2007 to enhance his June 30, 2007 DUI to a felony violated the prohibition against any bill of attainder under Article I, § 10 of the United States Constitution. App. 25-28. In this regard, the enhancement statute, N.D.C.C. § 39-08-01(2), uses the word, "offense," rather than the term, "prior conviction." Irwin also argued his constitutional claim could not be waived because it resulted in an illegal sentence and an illegal sentence cannot be waived; and, if the claim was waived, then Irwin was denied effective assistance of counsel. See, *State v. Clark*, 351 N.W.2d 532, 535-536 (Iowa 1984). App. 30-32.

The sentencing court denied Irwin's motion to withdraw his plea of guilty. App. 8-13. The court stated, "Irwin did not contest the foregoing factual basis at the January 23, 2008 hearing. Because Irwin had been convicted of all four previous offenses, the Court accepted the factual basis, and Irwin entered a voluntary plea of guilty." App. 10. The court did acknowledge that Irwin was not convicted of the June 13, 2007 DUI until December 7, 2007. App. 9.

The court relied on *State v. Skarsgard*, 2007 ND 159, ¶ 6, 740 N.W.2d 64, wherein the Supreme Court of North Dakota defined "offense" in N.D.C.C. § 39-08-01(2) using the definition contained in N.D.C.C. § 12.1-01-04(20), "conduct for which a term of imprisonment or a fine is authorized by statute after conviction." App. 11. The sentencing court read this language "as not requiring conviction to be considered an 'offense.'" App. 11. The court also rejected Irwin's bill of attainder claim. App. 11-13.

Irwin appealed to the Supreme Court of North Dakota. App. 1-7. The Court, citing the definition of "offense" adopted in *State v. Skarsgard*, supra, held, "the district court correctly found Irwin had four prior DUI convictions in the previous seven years when it accepted his guilty plea." App. 5. The Court, too, rejected Irwin's bill of attainder claim. App. 5-6.

## REASONS FOR GRANTING THE WRIT

This petition is premised upon the basic proposition that one should be punished for criminal conduct when and as it is committed. On June 30, 2007, Irwin had three prior convictions for DUI, and one pending charge of DUI from June 13, 2007. On June 30, 2007, there was no plea or finding of guilt, and thus no judicial determination of guilt, for Irwin's conduct on June 13, 2007. Still, the language of N.D.C.C. § 39-08-01(2), which provides for enhanced punishment for a prior "offense," was the authority to use Irwin's conduct on June 13, 2007 to enhance Irwin's conviction for his conduct on June 30, 2007 from a class A misdemeanor to a class C felony. Thus, the legislature determined the degree of Irwin's crime on June 30, 2007 without the benefit of a trial. This, Irwin contends, is a bill of attainder. This the courts of North Dakota have rejected. Irwin petitions this Court to decide this important question of federal law that has not been, but should be, settled by this Court. Irwin petitions too that the courts of North Dakota have

decided an important federal question in a way that conflicts with relevant decisions of this Court.

Article I, § 10 of the United States Constitution provides in relevant part, "No state shall . . . pass any bill of attainder . . . " "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 71 U.S. 277, 323 (1866); *United States v. Lovett*, 328 U.S. 303, 315 (1946). Here, we have a legislative act which inflicts punishment on June 30, 2007, without a judicial trial for Irwin's conduct on June 13, 2007. On June 30, 2007, it had been judicially determined that Irwin had three DUI offenses within seven years before his conduct on June 30, 2007; but it had only been legislatively determined that he also had a fourth DUI offense within that seven year period. That legislative determination of that fourth DUI offense inflicted punishment upon Irwin by enhancing him to felony offense and subjecting him to felony punishment.

"[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett*, supra, at 315-316. In *Lovett*, this Court used the prohibition against bill of attainders to void a congressional act which prevented payment of salaries to three named federal employees the House of Representatives believed were subversives. However, in *United States v. Brown*, 381 U.S. 437 (1965), this Court also invalidated a law

which declared unlawful the employment of a member of a specific group, the Communist Party. The Court found the law to inflict punishment on this specific group without a judicial trial. In *Cummings v. Missouri*, supra, at 323-324, the Court stated, "These bills are generally directed against individuals by name; but they may be directed against a whole class . . . These bills may inflict punishment absolutely, or may inflict it conditionally." Here, N.D.C.C. § 39-08-01(2) is directed at a specific group or class, that being any person who has an offense which has not been judicially determined at the time of the commission of that person's instant offense. N.D.C.C. § 39-08-01(2) inflicts punishment without a judicial trial.

In *Jones v. Slick*, 56 So.2d 459 (Fla. 1952), the Court held unconstitutional a city ordinance which declared that *any city official* found guilty of violation of city laws by two-thirds vote of the city council should be fined or imprisoned or both, and removed from office. In *State ex rel. Oklahoma State Bureau of Investigation v. Warren*, 975 P.2d 900, 907 (Okla. 1998), Opala, Justice, concurring in result, found a state statute which disqualified a person subject to "felony arrest" from holding a gun license to be "facially violative of the fundamental law's prohibition against bills of attainder." Cf., *De Veau v. Braisted*, 363 U.S. 144 (1960), wherein this Court upheld a state law which prevented *convicted felons* from holding a position with longshoremen unions.

"The prohibitions on 'Bills of Attainder' . . . prohibit legislatures from singling out disfavored persons

and meting out summary punishment for past conduct." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Bill of attainder "was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature." *United States v. Brown*, supra, at 442. A person with a prior offense of DUI, and certainly a person with multiple prior DUIs is a disfavored person. However, even these persons are protected from summary punishment or trial by legislature. Irwin requests such protection from this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**This opinion is subject to petition for rehearing**
**Filed 7/13/10 by Clerk of Supreme Court**
**IN THE SUPREME COURT**
**STATE OF NORTH DAKOTA**

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2010 ND 132

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State of North Dakota, Plaintiff and Appellee

v.

Craig Allen Irwin, Defendant and Appellant

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No. 20100082

---

Appeal from the District Court of Morton County, South Central Judicial District, the Honorable Thomas J. Schneider, Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Chief Justice.

Allen M. Koppy, State's Attorney, 210 2nd Ave. NW, Mandan, ND 58554, for plaintiff and appellee.

Michael R. Hoffman, P.O. Box 1056, Bismarck, ND 58502-1056, for defendant and appellant.

Jonathan R. Byers, Assistant Attorney General, Office of Attorney General, 600 E. Boulevard Ave.,

Bismarck, ND 58505-0040, for amicus curiae State of North Dakota. Submitted on brief.

**State v. Irwin**

**No. 20100082**

**VandeWalle, Chief Justice.**

[¶1] Craig Allen Irwin appealed from the district court order denying his motion to withdraw his guilty plea to a fifth charge of driving under the influence of intoxicating liquor ("DUI") in seven years. We affirm because withdrawal of Irwin's guilty plea was not necessary to correct a manifest injustice.

I.

[¶2] On June 13, 2007, Irwin was arrested for DUI in Burleigh County. The Burleigh County State's Attorney's Office charged him the following day with his fourth DUI in seven years. Two weeks after his Burleigh County arrest, Irwin was arrested again for DUI in Morton County. The Morton County State's Attorney's Office charged him with a fifth DUI in seven years, a class C felony.

[¶3] Irwin pled guilty to the Burleigh County charge on December 7, 2007, and was sentenced to one year in the custody of the Department of Corrections with three months suspended for two years, a $1000 fine, and fees. He pled guilty to the Morton County charge on January 23, 2008. The district court sentenced Irwin to five years in the custody of the Department

of Corrections, to be served concurrently with his Burleigh County sentence.

[¶4] Two years later, Irwin moved to withdraw his guilty plea under N.D.R.Crim.P. 32(d).[1] The district court concluded:

> Irwin did . . . plead guilty to and was convicted of the fourth DUI offense on December 7, 2007. The Court relied on this information when it concluded that a fifth or subsequent DUI offense had occurred in a seven-year period. The factual basis upon which the Court accepted Irwin's guilty plea was, and is, sound. Irwin has not suffered manifest injustice.

[¶5] The district court also rejected Irwin's argument that the DUI statute, N.D.C.C. § 39-08-01, was an unconstitutional bill of attainder. The district court explained Irwin was not denied a jury trial, as he pled guilty to both the Burleigh County and Morton County charges.

II.

[¶6] We note this is not a direct appeal from Irwin's conviction for his fifth DUI in seven years. It is an appeal from the district court's judgment denying his motion to withdraw his guilty plea. Under

---

[1] Rule 32(d), N.D.R.Crim.P., is now N.D.R.Crim.P. 11(d). N.D.R.Crim.P. 11, expl. note.

N.D.R.Crim.P. 32(d)(2), as it read at the time of Irwin's motion, "After a court accepts a guilty plea and imposes a sentence, the defendant cannot withdraw the plea unless the motion is timely and withdrawal is necessary to correct a manifest injustice." *State v. Blurton,* 2009 ND 144, ¶ 7, 770 N.W.2d 231 (citing *State v. Lium,* 2008 ND 33, ¶ 17, 744 N.W.2d 775). The determination of a manifest injustice is within the district court's discretion and this Court will not overturn it unless the district court abused its discretion. *Id.* (citing *Lium*, at ¶ 20).

[¶7] Irwin argues he has suffered a manifest injustice because on the date of his DUI in Morton County, he had only been convicted of three DUIs in the past seven years. His fourth DUI charge was still pending. North Dakota's DUI statute, N.D.C.C. § 39-08-01, states, in pertinent part:

> *A person violating this section or equivalent ordinance is guilty* of a class B misdemeanor for the first or second offense in a five-year period, of a class A misdemeanor for a third offense in a five-year period, of a class A misdemeanor for the fourth offense in a seven-year period, and *of a class C felony for a fifth or subsequent offense in a seven-year period.* The minimum penalty for violating this section is as provided in subsection 4. The court shall take judicial notice of the fact that an offense would be a subsequent offense if indicated by the records of the

> director or may make a subsequent offense finding based on other evidence.

N.D.C.C. § 39-08-01(2) (2007) (emphasis added).

[¶8] In *State v. Skarsgard,* this Court explained the definition of the term "offense" found in N.D.C.C. § 12.1-01-04(20) applies to N.D.C.C. tit. 39. *Skarsgard,* 2007 ND 159, ¶7, 740 N.W.2d 64. Section 12.1-01-04(20), N.D.C.C., defines "offense" as "conduct for which a term of imprisonment or a fine is authorized by statute after conviction." This Court held in *Skarsgard* that a DUI conviction that was currently on appeal could still be used to enhance the offense level of a subsequent DUI. *Skarsgard,* at ¶ 7. This Court explained, "Skarsgard's DUI and [driving under suspension] convictions by a jury trial meet the definition of offense as both driving under the influence and driving under suspension are conduct for which a term of imprisonment or fine is authorized by statute after conviction." *Id.*

[¶9] Here, the district court correctly found Irwin had four prior DUI convictions in the previous seven years when it accepted his guilty plea. The district court did not abuse its discretion when it determined Irwin did not suffer a manifest injustice.

III.

[¶10] Irwin also argues he suffered a manifest injustice because N.D.C.C. § 39-08-01 is an unconstitutional bill of attainder. Article I, Section 18 of the

North Dakota Constitution states, "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Article I, Section 9, Clause 3 of the United States Constitution similarly prohibits bills of attainder. The United States Supreme Court has explained a bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 468 (1977) (citing *United States v. Brown*, 381 U.S. 437, 445, 447 (1965); *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Ex parte Garland*, 4 Wall. 333, 377 (1867); *Cummings v. Missouri*, 4 Wall. 277, 323 (1867)). The Eighth Circuit Court of Appeals has stated, "In order to constitute a bill of attainder, a statute must impose a punishment upon a designated person or class of persons without the benefit of trial." *Jensen v. Heckler*, 766 F.2d 383, 386 (8th Cir. 1985) (citing *Nixon*, 433 U.S. at 468; *Brown*, 381 U.S. at 445).

[¶11] Irwin argues N.D.C.C. § 39-08-01 is a bill of attainder because the statute allowed him to be convicted of a fifth DUI charge in seven years, even though when he committed the crime he had not yet been convicted of a fourth DUI in seven years. The district court found Irwin was not punished without the benefit of trial because he pled guilty to both DUI charges, thus waiving his right to trial. The district court did not abuse its discretion when it denied his motion to withdraw his guilty plea.

IV.

[¶12] I We affirm the district court's order denying Irwin's motion to withdraw his guilty plea.

[¶13] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
Daniel J. Crothers
Mary Muehlen Maring
Carol Ronning Kapsner

**STATE OF NORTH DAKOTA**
**COUNTY OF MORTON**

**IN DISTRICT COURT**
**SOUTH CENTRAL JUDICIAL DISTRICT**
**Case No. 30-07-K-0634**

State of North Dakota,
Plaintiff,
vs.
Craig Allen Irwin,
Defendant.

**ORDER**

In the above-entitled action, Craig Irwin brings a motion to withdraw his guilty plea under Rule 32(d) of the North Dakota Rules of Criminal Procedure. Irwin's motion is premised on his assertion that a factual basis did not exist to support a fifth or subsequent DUI offense in a seven-year period on June 30, 2007, resulting in a class C felony conviction. Irwin also argues that N.D.C.C. § 39-08-01(2) is an unconstitutional Bill of Attainder.

At the time Irwin appeared in front of the Court regarding his fifth DUI offense, he had been convicted of or charged with the following: (1) A June 13, 2003 DUI conviction out of the Burleigh County District Court, arising from a January 3, 2003 offense date; (2) a June 13, 2003 DUI conviction out of the Burleigh County District Court, arising from a February 5, 2003 offense date; (3) a May 13, 2002 DUI conviction out of the Morton County District Court, arising

from a March 19, 2002 offense date; and (4) a December 7, 2007 DUI conviction out of the Burleigh County District Court, arising from a June 13, 2007 offense date.

## LAW AND DECISION

Pursuant to North Dakota Rule of Criminal Procedure 32:

> (1) The court must allow the defendant to withdraw a plea of guilty whenever the defendant, on a timely motion for withdrawal, proves withdrawal is necessary to correct a manifest injustice. (2) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations, and is not necessarily barred because made subsequent to judgment or sentence. (3) If the defendant does not show that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty as a matter of right once the court has accepted the plea. . . .

N.D. R. CRIM. P. 32(d).

### I. Factual Basis

Obtaining a factual basis for the plea serves at least three important purposes. "First, it assures that a defendant who seeks to plead guilty is in fact guilty. . . . In addition, the finding of a factual basis . . . eliminates post-conviction factfinding proceedings

aimed at determining the accuracy of guilty pleas. Finally, the information . . . is often useful to the court at sentencing." ***Kaiser v. State,*** 417 N.W.2d 175, 178 (N.D. 1987).

As to Irwin's fourth DUI offense, the State asserted:

> And then there is the case that was pending when Mr. Irwin was arrested on this one on June 30th of 2007, and that would have been criminal number 08-07-K-1217, that was a fourth in seven DUI in Burleigh County . . . and that would have been June 13th of 2007, would be the offense date on that. . . . And that did go to conviction within, I think, the last month. So those would be the four prior violations on the driving under the influence, Your Honor.

**Transcript of Proceedings** at 7, lns. 7-23 (Jan. 23, 2008). Irwin did not contest the foregoing factual basis at the January 23, 2008 hearing. Because Irwin had been convicted of all four previous offenses, the Court accepted the factual basis, and Irwin entered a voluntary plea of guilty. ***Id.*** at 14, lns. 12-22.

Now, more than two years after entering a voluntary plea of guilty on his fifth DUI offense, Irwin asserts that he did not waive his claims as to constitutionality because there was no affirmative showing of a factual basis, and thus his guilty plea cannot be sustained. **Defendant's Reply Brief** at 1. To support its factual basis, the State provided both the dates and case numbers to the Court for Irwin's four prior

DUI offenses. The State explained that Irwin had been convicted of all four of the prior offenses. Neither Irwin nor Irwin's counsel contested the State's factual recitation or any information pertaining thereto. Irwin's contention is rather that the Court erred in considering the June 13, 2007 arrest an "offense" as defined in N.D.C.C. § 39-08-01(2). Irwin also argues that his counsel wrongly conceded that his fourth charged DUI offense from June 13, 2007, pending on June 30, 2007, was an "offense," such that on June 30, 2007 Irwin violated the DUI statute and was guilty of a fifth "offense" in a seven-year period. **Defendant's Brief** at 4-5. Irwin cites ***State v. Skarsgard,*** 2007 ND 159, ¶ 6, 740 N.W.2d 64, in which the North Dakota Supreme Court defines "offense" as "'conduct for which a term of imprisonment or a fine is authorized by statute after conviction.'" ***Id.*** (citing **N.D. Cent. Code § 12.1-01-04(20)**. The Court reads this language as not requiring conviction to be considered an "offense." Irwin did, however, plead guilty to and was convicted of the fourth DUI offense on December 7, 2007. The Court relied on this information when it concluded that a fifth or subsequent DUI offense had occurred in a seven-year period. The factual basis upon which the Court accepted Irwin's guilty plea was, and is, sound. Irwin has not suffered manifest injustice.

## II. Bill of Attainder

Generally, a statute will be upheld unless the challenger demonstrates the statute's infirmity. ***Best***

***Prods. Co. v. Spaeth***, 461 N.W.2d 91, 95 (N.D. 1990). "One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." ***S. Valley Grain Dealers Ass'n v. Bd. of County Comm'rs of Richland County,*** 257 N.W.2d 425, 434 (N.D. 1995). The Court finds the Attorney General's Brief convincing on the issue of the constitutionality of N.D.C.C. § 39-08-01(2), and reiterates those arguments here:

> First, the punishment that Irwin received in this case was not punishment for the DUI he committed on June 13, 2007, and was convicted for on December 7, 2007. Irwin cannot claim he was punished for the June 13 offense while being deprived of a jury trial, as he entered a guilty plea to the offense.
>
> The punishment he was given in this case, 30-07-K-0634, was administered on January 23, 2008. When the sentence was issued, Irwin had 4 previous qualifying offenses, all of which had already resulted in a conviction. Irwin does not have standing to challenge the constitutionality of the statute on behalf of those defendants who may be sentenced on an "offense" that has not yet resulted in a conviction.
>
> Finally, the burden is on Irwin to support his assertion of constitutionality. He has not cited a single case that is even similar to the one at hand . . . He has failed to meet the

heavy burden to show that N.D.C.C. § 39-08-01(2) is an unconstitutional bill of attainder.

**Brief of Attorney General** at 3-4.

Accordingly, Irwin's Motion to Withdraw his Plea of Guilty is DENIED.

Dated this 9th day of March, 2010.

BY THE COURT:

/s/ Thomas J. Schneider
Thomas J. Schneider
District Judge

CC: Michael R. Hoffman
Allen Koppy
Jonathan Byers

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CRIMINAL NO. 07-K-634,
07-K-635
07-K-636

State of North Dakota,
Plaintiff,
Vs.
Craig Irwin,
Defendant.

Sentencing

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE
THOMAS J, SCHNEIDER
– DISTRICT JUDGE –

Taken At:
Morton County Courthouse
Mandan, North Dakota
January 23, 2008

APPEARANCES

FOR THE PLAINTIFF: MR. ALLEN KOPPY
State's Attorney
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FOR THE DEFENDANT: MR. WAYNE GOTER
Attorney at Law
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* * *

[2] THE COURT: We're on the record. The Court has before it the State of North Dakota versus Craig Irwin. And it's my understanding there will be some change of pleas today, Mr. Goter. Is that correct?

MR. GOTER: It is, Your Honor.

THE COURT: All right.

* * *

THE COURT: Mr. Irwin, in case 07-K-634, you are charged with driving under the influence and as charged a class C felony. The maximum penalty for that particular offense, in other words, the most you could be sentenced to if you were to either plead guilty or were found guilty would be a fine in the amount of [3] $5,000, a $400 administrative fee, $100 court facility fee and five years in jail. The minimum sentence includes a fine in the amount of $1,000, 180 days in jail, plus the $400 administrative fee, $100 court facility fee, and a chemical dependency evaluation is mandatory. Do you understand so far?

MR. IRWIN: Yes, I do.

* * *

[5] THE COURT: All right. Mr. Irwin, to the charge of driving under the influence, a class C felony, today are you withdrawing your plea of not guilty and entering a guilty plea to that offense?

MR. IRWIN: That's correct.

* * *

[6] THE COURT: Mr. Koppy, we need to go through the factual basis.

MR. KOPPY: Okay. Your Honor, would you like me to give a legal basis also for the level of offenses for the DUI and the DUR?

THE COURT: You will have to, yes.

MR. KOPPY: Okay, we can do that first. On the driving under the influence, Your Honor, it is alleged to be a fifth or more in seven years. The prior convictions would be there is a conviction from June 13th of 2003 out of Burleigh County District Court [7] from a January 3rd of 2003 offense date. Secondly, there is a June 13th of 2003 conviction for driving under the influence out of Burleigh County District Court from a February 5th of 2003 offense date.

The third conviction would be a May 13th of 2002 DUI conviction out of Morton County District Court arising from a March 19, 2002 offense date. And then there is the case that was pending when Mr. Irwin was arrested on this one on June 30th of 2007, and that would have been criminal number 08-07-K-1217, that was a fourth in seven DUI in Burleigh County.

THE COURT: Do you have the offense date for that too?

MR. KOPPY: Yeah, and that would have been June 13th of 2007, would be the offense date on that.

THE COURT: Okay.

MR. KOPPY: A couple weeks prior to the incident offense, Your Honor.

THE COURT: Okay.

MR. KOPPY: And that did go to conviction within, I think, the last month. So those would be the four prior violations on the driving under the influence, Your Honor.

* * *

[14] THE COURT: All right. Thank you. Mr. Goter, anything you want to say regarding the facts at all?

MR. GOTER: No. There was – we could have gone to trial, I think, on it. Craig elected not to after considering the pros and cons, but there is enough there that the jury could find him guilty.

THE COURT: On all three counts?

MR. GOTER: Yes.

THE COURT: All right. There is a factual basis to accept the pleas of guilty.

* * *

[18] THE COURT: Okay. Mr. Goter, Mr. Koppy, I received probably part of the presentence

investigation from Burleigh County on the matter that – the sentencing in Burleigh County back in, looks like December 7th you were in court over there.

MR. GOTER: That's correct.

* * *

[19] THE COURT: Okay. Mr. Goter, you wanted to make a recommendation regarding sentencing?

MR. GOTER: I do, Your Honor. This case has taken some turns I never anticipated. It started out where we had three priors and then we had this one pending and then thought, well, if we had got to court here first, we would have only four on the table including this one, if it had turned out badly. And then the Supreme Court had a decision on the very point, and then said if it's number of offenses, you really don't have to have prior convictions at the time of the offense. A lot of states say otherwise, so that was against us and one of the factors in the change of plea.

* * *

[30] THE COURT: Okay. Well, Mr. Irwin, you had a few good months here, it looks like. You said you were trying to stay sober and not drink, but you knew what was facing you and it was good that you did that, but it looks like you earned your way into jail. Counted up the DUIs, as I said, and there are 17. As I mentioned, the numerous, numerous driving under revocations, driving under suspensions,

driving without liability insurance, you know, so basically I think you are going to have to earn your way out of jail.

So the class C felony, Mr. Irwin, this is a serious charge. It's lucky that you haven't hurt anybody over the years with the number of driving offenses that you have, DUIs, so it will be a straight [31] five years on the class C felony, plus the evaluation, follow through with treatment. Wherever the Department of Corrections wants to place you, if they want to parole you or whatever they want to do, that's up to them, but with your record of 17 DUIs, I cannot justify giving you a lighter sentence.

* * *

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
COUNTY OF MORTON
STATE OF NORTH DAKOTA

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| The State of North Dakota,<br>Plaintiff,<br><br>vs.<br><br>Craig Allen Irwin,<br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case No. 30-07-K-634 |

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MOTION AND BRIEF TO
WITHDRAW PLEA OF GUILTY

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Craig Allen Irwin, defendant, under Rule 32(d), NDRCrimP, moves the court to withdraw his plea of guilty in this case. Withdrawal of his plea of guilty is necessary to correct a manifest injustice, and as such the court must allow him to withdraw his plea of guilty. Rule 32(d)(1), NDRCrimP.

## STATEMENT OF THE FACTS

The Information (R. 20) in this case charged Irwin with Driving a Vehicle While Under the Influence of Intoxicating Liquor on June 30, 2007, "a fifth (5th) or subsequent violation of Section 39-08-01 or equivalent statute or ordinance in a seven (7) year

period", a class C felony. On January 23, 2008, Irwin pleaded guilty to the Information (Tr. Sentencing 2- 5).

In the factual basis, the State indicated a prior conviction (for DUI) on June 13, 2003, with an offense date of January 3, 2003; a DUI conviction on June 13, 2003, with an offense date of February 5, 2003; and a DUI conviction on May 13, 2002, with an offense date of March 19, 2002. "And then there is the case that was pending when Mr. Irwin was arrested on this one on June 30th of 2007, and that would have been criminal number 08-07-K-1217 . . . June 13th of 2007, would be the offense date on that . . . [T]hat did go to conviction within, I think, the last month." (Tr. Sentencing 6-7; see State's Motion to Amend Criminal Complaint, R. 6).[1] The State then gave the factual basis for Irwin's conduct on June 30, 2007, constituting driving under the influence (Tr. Sentencing 8-13). Irwin's lawyer at sentencing stated nothing in regard to the factual basis, and the Court found a factual basis to accept Irwin's plea of guilty (Tr. Sentencing 14).

In regard to Irwin's June 13, 2007 charge of DUI, pending on June 30, 2007, Irwin's counsel stated, "the Supreme Court had a decision on the very point, and then said if it's number of offenses, you really don't have to have prior convictions at the time of the

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[1] Irwin was sentenced in 08-07-K-1217 on December 7, 2007 (Tr. Sentencing 18). Irwin pleaded guilty in that case on October 31, 2007. That DUI was charged as a 4th offense.

offense. A lot of states say otherwise, so that was against us and one of the factors in the change of plea." (Tr. Sentencing 19).

The Court sentenced Irwin to "a straight five years on the class C felony" (Tr. Sentencing 30-31; see Criminal Judgment and Commitment, R. 32).

## ARGUMENT

### I. Introduction

Irwin contends there did not exist a factual basis supporting a fifth or subsequent offense in a seven-year period on June 30, 2007, and therefore there did not exist a factual basis to support a class C felony. Irwin admits there existed a factual basis to support a fourth offense in a seven-year period on June 30, 2007, which would be a class A misdemeanor.

If the factual basis does not support the class C felony, the Court erred in accepting Irwin's guilty plea on the class C felony. See *Kaiser v. State,* 417 N.W.2d 175 (N.D. 1987) (Where the record did not affirmatively indicate a factual basis existed, the trial court erred in presuming the existence of such factual basis and in accepting defendant's guilty plea).

Irwin's plea of guilty to the class C felony must be withdrawn. Irwin has no objection to an amended complaint being filed charging him with a fourth offense DUI on June 30, 2007. Irwin would plead guilty to that amended complaint and agree that the factual basis given at his sentencing on January 23,

2008 supports his plea of guilty to that class A misdemeanor.

II. N.D.C.C. § 39-08-01(2)

On June 30, 2007, N.D.C.C. § 39-08-01(2) provided:

> *A person violating this section* or equivalent ordinance *is guilty* of a class B misdemeanor for the first or second offense in a five-year period, of a class A misdemeanor for a third offense in a five-year period, of a class A misdemeanor for the fourth offense in a seven-year period, and *of a class C felony for a fifth or subsequent offense in a seven-year period.* The minimum penalty for violating this section is as provided in subsection 4. The court shall take judicial notice of the fact that an offense would be a subsequent offense if indicated by the records of the director or may make a subsequent offense finding based on other evidence.

(See Attachment 1-3) (emphasis added).

At sentencing, Irwin's counsel indicated a Supreme Court decision on point purportedly holding that, on June 30, 2007, there only had to be a "number of offenses" and there did not have to be "prior convictions". Irwin's counsel did not give a case citation. Irwin's counsel was conceding that Irwin's charged offense of DUI from June 13, 2007, pending on June 30, 2007, was an "offense" under N.D.C.C.

§ 39-08-01(2) such that on June 30, 2007 Irwin violated the DUI statute and was guilty of a fifth "offense" in a seven-year period.

*State v. Skarsgard,* 2007 ND 159, 740 N.W.2d 64, decided on October 16, 2007, addressed the meaning of "offense" in N.D.C.C. § 39-08-01(2). *Id.*, at ¶ 6. In October 2006, Skarsgard was found guilty by a jury of DUI. He appealed that criminal judgment to the North Dakota Supreme Court in October 2006. Skarsgard was found guilty by a jury in December 2006 of another charge of DUI "stemming from another incident." His appeal of the October judgment was pending at the time of his December trial and sentencing. *Id.*, at ¶2. In the *Skarsgard* opinion, there was no discussion of the dates of the commission of the two subject DUI's.

The stated issue in *Skarsgard* was whether the criminal judgment on appeal could be used for enhancement of the other DUI. *Id.*, at ¶ 4. Skarsgard argued that criminal judgments on appeal are not "convictions" as that term is defined in N.D.C.C. § 39-06-30 and therefore cannot be used for sentence enhancement to DUI – 5th, a class C felony. *Id.*, at ¶¶ 1, 4. See N.D.C.C. § 39-06-30 (Attachment 4).

The Court in *Skarsgard* used the definition of "offense" in N.D.C.C. § 12.1-01-04(20) (Attachment 5-7) to define "offense" in N.D.C.C. § 39-08-01(2). The Court stated, "Unless a different meaning plainly is required, an 'offense' is defined as 'conduct for which a term of imprisonment or a fine is authorized by

statute after conviction.'" *Id.*, at ¶ 6. The Court held that Skarsgard's October DUI conviction by a jury trial met the definition of "offense" as it was conduct for which a term of imprisonment or fine is authorized by statute after conviction. Therefore, it could be used for enhancement. *Id.*, at ¶ 7.

As the issue was framed and discussed in *Skarsgard,* the case is what it is. Irwin's counsel at sentencing seemed to sense there was more to the issue as he specifically mentioned "at the time of the offense", that being June 30, 2007. As stated above, *Skarsgard* does not discuss the dates of commission of Skarsgard's subject DUI's. However, the focus has to be Irwin's conduct on June 30, 2007, as that was the conduct which was charged in the Information, and it was to that Information Irwin entered his plea of guilty and was sentenced on January 23, 2008. On June 30, 2007, however, the June 13, 2007 conduct was only an allegation, a charge, pending and not adjudicated. As such, Irwin contends it could not be used for enhancement even taking into account *State v. Skarsgard* and defining "offense" as "conduct for which a term of imprisonment or a fine is authorized by statute after conviction."

III. Bill of Attainder

On June 30, 2007, Irwin had not been convicted for the conduct on June 13, 2007. In other words, at the time of the commission of this DUI, Irwin had not been convicted for the conduct used to enhance his

sentence for this DUI from a class A misdemeanor to a class C felony.

Article 1, § 10 of the United States Constitution provides in relevant part, "No state shall . . . pass any bill of attainder". Article I, Section 18 of the North Dakota Constitution provides in relevant part, "No bill of attainder . . . shall ever be passed."

"A bill of attainder is a legislative act which inflicts punishment without a trial." *Cummings v. State of Missouri,* 71 U.S. 277, 323 (1866); *United States v. Lovett,* 328 U.S. 303, 315 (1946). Bills of attainder include "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Lovett,* supra. Also, "what cannot be done directly cannot be done indirectly." *Cummings v. State of Missouri,* supra at 325.

In *United States v. Lovett,* the Court further wrote:

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. [Citation omitted]. And even the courts to which this important function was entrusted, were commanded to

> stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him. [Citation omitted]. When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.

Supra at 316-318.

On June 30, 2007, Irwin had not had a trial on the offense charged from June 13, 2007, and did not have a conviction. However, our legislature thought Irwin guilty of conduct deserving of punishment by allowing this "offense" to be used to enhance Irwin's crime from a class A misdemeanor to a class C felony, and hence to increase his punishment from one year incarceration to five years incarceration. This is exactly a bill of attainder. It is a "trial by legislature" without the aforementioned safeguards of a trial in the courts. *United States v. Brown,* 381 U.S. 437, 442

(1965). In this respect, N.D.C.C. § 39-08-01(2) is unconstitutional.

IV. N.D.C.C. § 19-03.1-23(5)

Our legislature got it correct in N.D.C.C. § 19-03.1-23(5) (see Attachment 8-11) which provides in relevant part:

> The prior offense must be alleged in the complaint, information, or indictment. The plea or finding of guilt for the prior offense must have occurred before the date of the commission of the offense or offenses charged in the complaint, information, or indictment.

(Attachment 10). In the drug code, prior "offense" is defined by a plea or finding of guilt for such conduct, and such plea or finding of guilt must have occurred before the date of the commission of the offense for which the person is now being sentenced. This is constitutionally correct, and this is what is constitutionally required here.

WHEREFORE, defendant Irwin moves the Court to grant this motion, order that his plea of guilty to the class C felony be withdrawn, and for such other relief requested in this motion.

Dated: February 12, 2010.

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/s/ Michael R. Hoffman
Michael R. Hoffman

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| STATE OF NORTH DAKOTA | IN DISTRICT COURT |
| COUNTY OF MORTON | SOUTH CENTRAL JUDICIAL DISTRICT |

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| The State of North Dakota, Plaintiff, | ) | |
| vs. | ) | Case No. 30-07-K-634 |
| Craig Allen Irwin, Defendant. | ) | |

## IRWIN'S REPLY BRIEF TO BRIEF OF ATTORNEY GENERAL

Craig Allen Irwin, defendant, files this reply to the Brief of Attorney General dated February 24, 2010.

The Attorney General argues Irwin waived his constitutional claim. Irwin contends his claim cannot be waived. Irwin's claim is based on the fact that a factual basis did not exist for his sentence enhancement in that the Constitutions of the United States and North Dakota require a prior conviction for the enhancement, not simply an unadjudicated offense, and therefore his felony sentence was illegal. An illegal sentence cannot be waived.

As argued in Irwin's primary brief, if there is no affirmative showing of a factual basis, a plea of guilty cannot be sustained. *Kaiser v. State,* 417 N.W.2d 175 (N.D. 1987). There is no waiver of a factual basis.

A claim that there is no factual basis can be raised at any time. See *Kaiser v. State,* supra.

Irwin's claim that there is no factual basis for his enhancement to a felony happens to be based on a constitutional infirmity. This does not change the law that there has to be an affirmative showing of a factual basis. The question of whether or not there is a constitutional infirmity is a question of law, and the infirmity either exists or it does not. If it does exist, there is no affirmative showing of a factual basis. This is not a defense, and therefore the Attorney General's reliance on *State v. Magnuson,* 1997 ND 228, ¶ 10, 571 N.W.2d 642, is misplaced.

Further, if there is no factual basis for the enhancement, then the enhancement is illegal. Rule 35(a), N.D.R.Crim.P., provides in relevant part, "The sentencing court may correct an illegal sentence at any time . . . " See *Ostafin v. State,* 1997 ND 102, ¶ 12, 564 N.W.2d 616; *State v. Trieb,* 533 N.W.2d 678, 680 (N.D. 1995).

Finally, if Irwin's claim was waived as argued by the Attorney General, then Irwin was denied effective representation. Irwin's trial counsel "had a basis for arguing" Irwin's claim, and a "reasonably competent attorney would have found worth in raising the question". See *State v. Clark,* 351 N.W.2d 532, 535-536 (Iowa 1984), wherein the Supreme Court of Iowa found ineffective assistance of counsel for failure to raise a similar claim of an illegal enhancement. See also *Owens v. State,* 1998 ND 106, ¶ 30, 578 N.W.2d

542, setting forth the standard of proving ineffective assistance of counsel. This standard is met in this case.

Irwin requests the Court to grant his motion.

Dated: March 2, 2010.

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